IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted] 20

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION ON APPEAL.

E. C. Dobbs,
Thomas Balmer,
Edward C. Mathias,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 878

GREAT NORTHERN RAILWAY COMPANY,
Appellant,

vs.

STATE OF WASHINGTON,
Appellee.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial Code, Sec. 237 (a) (28 U. S. Code, Sec. 344), reading, to the extent relevant here, as follows:

"Section 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision

> could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

The remedy by writ of error under the foregoing section, has been abolished and an appeal substituted.

> Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, Sec. 861 a, 861 b);
>
> *Nashville, etc., Ry.* v. *White*, 278 U. S. 456, 460;
>
> *Great Northern Ry. Co.* v. *Minnesota*, 278 U. S. 503, 506;
>
> *Larson* v. *South Dakota*, 278 U. S. 429, 432.

B.

Statute of the State the Validity of Which Is Involved.

The statute of the State of Washington, the validity of which has been sustained by the Supreme Court of the State of Washington, the highest court of said State, as not being violative of or repugnant to the provisions of the Constitution and Laws of the United States, is Chapter 107, Session Laws of 1929, State of Washington. The pertinent provisions thereof are:

> "CHAPTER 107.
>
> (H. B. 200.)
>
> Fees Required of Public Utility Companies.
>
> AN ACT relating to public utility companies, providing for increased fees and amending Section 1 of Chapter 113 of the Laws of 1921, as amended by Section

1 of Chapter 107 of the Laws of 1923 (Section 10417 of Remington's Compiled Statutes).

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That section 1 of Chapter 113 of the Laws of 1921, as amended by section 1 of chapter 107 of the Laws of 1923 (section 10417 of Remington's Compiled Statutes) be amended to read as follows:

SECTION 1. That hereafter every person, firm or corporation engaged in business as a public utility and subject to regulation as to rates and charges by the department of public works, except auto transportation companies and steamboat companies holding certificates under chapter 248 of the Laws of 1927, shall, on or before the first day of April of each year, file with the department of public works a statement on oath showing its gross operating revenue for the preceding calendar year or portion thereof and pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue: *Provided*, That the fee so paid shall in no case be less than ten dollars."

Section 2 of Chapter 113, Laws of 1921, which remained in effect with the foregoing amendment of Section 1, reads as follows:

"SEC. 2. All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the State treasurer, and by him deposited in a fund to be known as the public service revolving fund."

C.

Date of Judgment and Date of Application for Appeal.

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is March 3rd, 1936.

The judgment of the Supreme Court of the State of Washington was a judgment reversing the judgment of the trial court holding the aforesaid Chapter 107 unconstitutional. The judgment of the Supreme Court of Washington directed the Superior Court to dismiss the action. This judgment of the Supreme Court of the State of Washington is a final judgment within the meaning of Judicial Code, Sec. 237.

Rio Grande Western R. Co. v. *Stringham*, 239 U. S. 44.
Gulf Refining Co. v. *U. S.*, 269 U. S. 125.

The time for taking the appeal began to run on the date of such final judgment, to-wit, March 3rd, 1936. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgments of the Supreme Court of the State of Washington is considered.)

The date on which the application for appeal was presented and the appeal allowed is March 3rd, 1936.

D.

Nature of Case and Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

On March 9th, 1934, appellant Great Northern Railway Company, a corporation, filed its amended complaint against the State of Washington, appellee, in the Superior Court of Thurston County, Washington, to recover from the State of Washington the annual fees paid under protest to the Department of Public Works of Washington under Chapter 107, Laws of 1929 (Remington's Compiled Statutes, Section 10417), for the calendar years 1929 to 1932, inclusive. At the trial it was stipulated that the fee

for the year 1933, which was also paid under protest, should be included in the action. The amended complaint also attacked the fees payable to the Department of Public Works under Chapter 113, Laws 1921, as amended by Chapter 107, Laws 1923, and to the Secretary of State under Chapter 227, Laws 1929, but at the trial the appellant did not question the validity of those statutes. The issue was thus limited to the constitutionality of Chapter 107, Laws of 1929.

The amended complaint demanded a money judgment of $24,162.80, the total annual fees paid by appellant under Chapter 107, Laws 1929, for the calendar years 1929 to 1932, inclusive, together with interest; the amendment made by stipulation at the trial increased the amount demanded by $3,137.05, the fee paid by appellant for the calendar year 1933, together with interest; but by the withdrawal by appellant of its attack upon the prior statutes, the amount in controversy was reduced to $20,946.97 for the five calendar years 1929 to 1933, inclusive, plus interest, a total of $25,466.47. Appellant was granted judgment for this amount, together with its costs, against appellee in the Superior Court of the State of Washington for Thurston County on the first day of April, 1935.

Appellant alleged in its amended complaint and contended in the trial court and the Supreme Court of the State that said Chapter 107, Laws of 1929, contravenes the 14th Amendment and the Commerce Clause of the Constitution of the United States. Appellant contended that said act is (1) void on its face, and (2) void because of its operative effect, (a) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all,

in the aggregate; and (b) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of many duties and activities of the department which are not of a regulatory or supervisory nature, but are administrative, police or judicial, the expense of which cannot be imposed upon appellant in the guise of a regulatory or supervisory fee.

Appellee's answer admitted the payment by appellant of the annual fees under protest; admitted "that the Department of Public Works exercises jurisdiction and supervision over many classes of public utilities including common carriers in the State of Washington, and that property belonging to plaintiff in the State of Washington is assessed upon an ad valorem basis for taxation like other property within the State;" admitted appellant's corporate status and capacity to sue, but denied substantially all other allegations of the amended complaint.

The amended complaint attacked Chapter 107, Laws of 1929, whether considered as imposing an occupation or excise tax or as imposing an inspection or regulatory fee. After the commencement of the suit the Supreme Court of the State held that the act imposes a regulatory or inspection fee, not an occupation or excise tax. See *Pacific T. & T. Co.* v. *Seattle,* 172 Wash. 649, 21 Pac. (2d) 721, affirmed in 291 U. S. 300. In that case it was also held by the State Supreme Court that the fund created by the fees paid under Chapter 107, Laws 1929, is solely for the purpose of defraying the expenses attendant upon the administration of the Public Service Commission law of the State. In view of this holding, which defines the fee under attack as one to pay the expense of regulation and supervision, many of the allegations of the complaint became irrelevant.

Paragraph XV of appellant's amended complaint (first cause of action), however, is especially directed to the point that the act is invalid as an inspection or regulatory fee. This paragraph alleges:

> "Under the Public Service Commission Law (Chapter 117, Session Laws 1911, Sections 10339 to 10490, inclusive, R. C. S., as amended) and under other laws of this state, the Department of Public Works exercises jurisdiction over and supervision of many classes of public utilities, including common carriers by rail, railroads operated by electricity, street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, carriers by water, and many other activities wholly disconnected from and unrelated to its duties of inspection and supervision of common carriers by railroad, and is charged with the performance of a variety of duties, other than those pertaining to inspection and supervision of common carriers by railroad under the police power of the state. If Chapter 113, Session Laws of 1921, Chapter 107, Session Laws of 1923, and Chapter 107, Session Laws of 1929, or any of them be construed as imposing a fee for supervision and inspection, then said statutes, and each of them, do not restrict the fee to be paid by plaintiff or other common carriers by rail, to the cost of legitimate regulation or supervision, nor is such fee based upon the proper cost or expense thereof, but the same is a flat fee of a percentage of gross revenue levied upon carriers by rail, and other corporations, for the purpose of paying the expense of supervising and inspecting a variety of independent and unrelated corporations, as above alleged, and for the purpose of paying the expense of performance of a variety of unrelated duties, including the expense of performing duties and discharging functions which properly pertain to inspection, supervision and regulation, and many expenses of performing duties and discharging functions, such as business and policing expenses, the expense whereof cannot be

imposed upon common carriers by rail, including plaintiff, as legitimate expenses of supervising, inspecting and regulating such common carriers by rail. The fee or tax provided by said Chapter 107, Session Laws of 1929, and the other statutes hereinbefore mentioned, is grossly in excess of the reasonable cost of inspection and supervision of common carriers by rail. Plaintiff is informed and believes, and alleges that there has been accumulated from the fees paid under said acts, up to and including the first of January, 1933, the sum of more than $250,000 in excess of the amount expended by the Department of Public Works in the discharge of its manifold duties and functions under the laws of this state. Said fee or tax is not a reasonable or legitimate inspection or supervision fee or tax, but said statutes, and each of them, are in truth and in fact, revenue measures. The taxes imposed by and under said statutes are made payable into the public service revolving fund, which fund is a general state fund, subject to withdrawal for various and sundry expenses of the state, and not solely devoted by law to the expense incurred by the Department of Public Works in the performance of its duties of inspection or supervision of common carriers by rail, or other corporations or businesses subject to its jurisdiction. Said fee or tax, if construed to be a supervision or inspection fee or tax, is and constitutes a burden on, and regulation of, interstate commerce in violation of Section 8, Article 1 of the Constitution of the United States, is capricious, arbitrary, excessive and unreasonable, and is discriminatory and unequal, denies to plaintiff the equal protection of the laws, and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 3 and 12 and Article VII, Sections 1, 2 and 3 of the State Constitution."

The Superior Court of the State of Washington held Chapter 107, Laws 1929, to be unconstitutional on its face

(a) because it imposes a flat fee or tax upon railroads and other unrelated utility companies, not limited or measured by the expense of regulating them respectively but to pay the expenses of regulating them all in the aggregate, and (b) because the fee or tax is imposd and used to pay the expense of many duties and activities of the Department of Public Works which are not of a regulatory or supervisory nature but are administrative, police or judicial. For the purpose of the record, however, the Superior Court admitted evidence to show the operative effect of the act, and from such evidence found and concluded that the fees collected by the Department of Public Works were unreasonable and bore no just relation to the cost of regulation and inspection of railroads.

The trial court's findings show that, under the public service commission law and other laws, the Department of Public Works exercises jurisdiction over and supervises many classes of public utilities, including common carriers by rail, electric and street railways, gas, electrical and water companies, telegraph and telephone companies, wharfingers and warehousemen, and carriers by water, with respect to which it exercises many regulatory and supervisory duties; that the Department also has many other important duties wholly unrelated to its duties of inspection and supervision of railroads and other utilities, including the duty, prescribed by Sec. 10394, Remington's Compiled Statutes, to take part in litigation before the Interstate Commerce Commission with respect to interstate rates; that the Department is constantly engaged in such litigation and incurs large expense, as may be seen from its annual reports in evidence; that the Department takes sides and participates in such litigation, sometimes on the side of the carriers operating in this State, and at other times against them, and sometimes in favor of some carriers in the State and against others operating in the State; that under Sections 10433

and 10434, Remington's Compiled Statutes, the Department acts judicially in ordering refunds of alleged overcharges—a prolific source of litigation and expense, as may be seen from the annual reports; that Section 10442, Remington's Compiled Statutes, provides for litigation to enforce the orders of the Department, which is also a source of considerable expense; that in none of these activities does the Department exercise supervisory or regulatory authority of which the cost can be charged to railroads.

The trial court concluded and decided that said Chapter 107, Laws 1929, violates Article I, Section 8, and the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States, and, as heretofore stated, awarded appellant judgment against appellee for recovery of the excess amounts of the fees paid. Thereafter an appeal was taken by the State of Washington to the Supreme Court of the State of Washington, which court on December 12, 1935, delivered an opinion upholding the validity of said act as not being in violation of any of said provisions of the Constitution of the United States, and remanded said cause to the Superior Court with directions to dismiss the action. Appellant on January 4, 1936, filed a petition for rehearing, which the State Supreme Court denied on February 10, 1936, and final judgment of the Supreme Court directing dismissal of the action was so entered on the 3rd day of March, 1936. The opinion and judgment which the Supreme Court rendered and entered are not, and could not have been rendered or entered without denying to appellant all of the rights asserted by it under said constitutional provisions, and said opinion and judgment are not and can not be rested upon any independent non-Federal grounds.

The opinion of the Supreme Court of Washington (84 Wash. Decisions, 545-555) is in part as follows:

"* * * Two questions are thus presented to us for determination: (1) Whether the act is unconstitutional on its face, and (2) whether it is invalid because of its operative effect.

"Respondent's main contention is that the act is void on its face (1) because the fee, or tax, is not imposed for, nor limited by, the reasonable cost of supervising and regulating railroad companies, but is a flat fee imposed on railroad companies, and many unrelated utility companies as well, to pay the expenses of regulating them all, in the aggregate; and (2) because the fee, or tax, is imposed, both on railroad companies and on many unrelated utility companies, to pay not only the expenses incident to their supervision and regulation in general, but also the expenses of any and all duties and activities of the department, whether regulatory, administrative, police, or judicial. It is contended that, because of its unlimited scope, as thus challenged, the act contravenes the fourteenth amendment of the constitution of the United States and also the fourteenth amendment of the constitution of the state of Washington.

"* * *

"In considering the question of the constitutionality of a legislative act, two principles, well settled in this state, must be kept in mind. The first is this: The courts will presume that an act regularly passed by the legislature is a valid law, and they will not declare it unconstitutional unless it is clearly shown to be so. * * *

"The other principle is this: The courts will not take evidence as to the unconstitutionality of a legislative act, but will determine its constitutionality or unconstitutionality from matters that appear on the face of the act itself or from facts of which the courts may take judicial notice. * * *

"Nothing appears on the face of the act under consideration to indicate, or even suggest, that it is unconstitutional, and there are no facts supplied by judicial notice to give it that effect. The act imposes upon

all utilities subject to regulation, with two exceptions, a fee, or tax, of one-tenth of one per cent of their gross operating revenues, the fees to be paid into the public service revolving fund. The two classes of excepted utilities are dealt with in other statutes similar in nature. * * *

"The purpose of the present act being, in our opinion, apparent on its face as one of regulation, and having been so judicially declared, it must be presumed that the legislature was in possession of advisory facts on which it proceeded when passing the act. It must further be presumed that, from the information possessed by it, the legislature concluded that the amount of the fees, as determined by the prescribed rates of percentage, was reasonably necessary to meet the cost of supervising and regulating the respective utilities. We are convinced that the act cannot be declared to be unconstitutional on its face or from facts of which the court can take judicial notice.

"Respondent's second contention is that the invalidity of the act was established by the evidence produced upon the trial. Respondent's contention upon this phase of the case, as we understand it, is that evidence is admissible not so much for the purpose of showing that an act is unconstitutional in its inception, or upon its face, but rather to show that the act has become invalid because of its intentional result or by its operative effect.

"There is eminent authority supporting the principle upon which that contention is based. * * *

"* * *

"But assuming that the principle just adverted to has legal acceptance and that there are instances in which it may properly be applied, we apprehend that this case was not submitted to the court, nor decided by it, upon that theory; and if it was, then we are further convinced that the evidence neither compels nor warrants a finding of invalidity of the act because of the result intended by the legislature or because of the operative effect of the act.

"The record reveals that the court, at the conclusion of the trial, was of the view that the question was entirely one of law, and that the evidence, as submitted, was immaterial and irrelevant. That was the position taken by appellant's counsel from the beginning, and respondent's counsel appear to have finally conceded the point. In the progress of the trial, however, the court admitted the evidence for the purpose of completing the record, so to speak, and to obviate the possible necessity of being required to take evidence later on because of an adverse decision, on appeal, on the question of law.

"Although the court did make findings based on such evidence, from which certain conclusions were drawn, and upon which the judgment as entered was based, yet, as already stated, the court considered the question as essentially one of law and not one of fact, nor even as one of mixed law and fact. If we should likewise consider the matter as being solely one of law, then what we have already stated would necessarily dispose of this case, on the ground that the 1929 act is not unconstitutional on its face, nor to be declared so from facts of which we may take judicial knowledge. However, since the record presents the case as one having a factual angle, we shall, for the purpose of the argument, consider that phase of it and express our view thereon.

"This is a law action. The material allegations of the complaint were denied by the answer. The burden of proof, therefore, rested on the plaintiff, who is the respondent here. The evidence consisted entirely of documentary records and the testimony of one witness, the auditor of the department of public works. The documentary records consisted almost entirely of the annual reports of the department to the governor. Those reports gave a resume of the activities of the department and the expenses incident thereto. It is true that the reports did not show that the total amount of the expenses incurred was allocated to the respective classes of utilities in proportion to the cost

of supervising and regulating each class; on the contrary, so far as is shown by the reports, all expenses of supervising and regulating the utilities, generally, were paid, as required, from the public service revolving fund, into which the fees collected from the several utilities had been deposited. But the reports did show that a vast amount of supervision and regulation was necessary and had been done with respect to railroads, as well as the other and unrelated utilities.

"The real controversy on the question of fact in the case was whether one-tenth of one per cent of the gross revenues of the railroads, from intrastate commerce, was more than was reasonably necessary to cover the cost and expense of railroad supervision and regulation. From what appears in the reports it could not be said dogmatically that the rate of percentage prescribed by the act was unnecessarily excessive. Indeed, it is contended by the respondent, and so found by the court, that, inasmuch as the department was not required by law to keep, and in fact did not keep, an account of the expense of regulating and supervising railroads, separate and apart from the expense of supervising and regulating other public utilities, it was practically impossible at the time of the trial to make any intelligible segregation. But the difficulty attendant upon meeting the burden of proof does not obviate the necessity of it. The burden rested upon and remained with the respondent and did not, because of its difficulty, shift to the appellant. Not having met the burden imposed upon it, the respondent did not make a case for relief.

"But, going even beyond that, the auditor testified that for years he has kept an account which showed that the cost of supervising and regulating the railroads of the state far exceeded the amount of the fees imposed upon them by the act. While the account kept by the auditor was not official, in the sense that, of itself, it was admissible in evidence, yet what the auditor did in that respect qualified him to testify as to the ultimate fact. Without further detailing the evi-

dence, we will say that; in our opinion, and in so far as there was any evidence on the subject, it preponderated against the findings made by the court as to the cost of supervising and regulating railroads.

"The mainspring of respondent's contention upon the immediate point is that many of the activities of the department are not supervisory or regulatory in nature, but are administrative or judicial in character, and that the utilities cannot be required to pay fees which are used, in part, to carry on these latter functions. It may be admitted that, if taxes, or fees, should be levied to pay for services in no way connected with public utilities, and at the same time such utilities were subjected to direct taxation upon their properties for such purposes equally with other corporations, while the other corporations were not required to pay the prescribed taxes, or fees, then there would be just ground for complaint of unlawful discrimination against such public utilities. But that is not the case here.

"Respondent takes altogether too narrow a view of the scope and purview of a supervisory or regulatory act, such as the one in question. The purpose of the act is not limited to mere *inspection* of railroad property, but is a much broader and more comprehensive one. Though railroads are private corporations, their uses are public. They exist for the convenience of the people in various kinds of transportation. They are given certain special privileges to be exercised in the interest of the public, and, to guarantee their performance, the railroads, like other public utilities, are made subject to regulation. Such regulation extends not only to matters affecting safety in transportation of passengers and freight, but also to matters affecting adequacy of transportation and reasonableness of rates.

"In the very nature and necessity of things, such regulation must have a broad field, the extent of which must be determined by legislative discretion. The power of regulation conferred upon the department of

public works must be commensurate with the duties to be performed and the purposes to be lawfully effected. When the interests of the public and of individuals or corporations are blended in a service imposed by law, it is a matter of legislative discretion to determine who shall bear the cost and in what proportions.

* * *

"In the case now before us, the activities of the department with respect to railroads were, in our opinion, clearly within the field of proper supervision and regulation. * * *".

The final judgment of the Supreme Court of the State of Washington was entered on the 3rd day of March, 1936.

E.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of this Court:

Great Northern Ry. Co. v. *State of Minnesota*, 278 U. S. 503;

King Manufacturing Co. v. *City Council of Augusta*, 277 U. S. 100;

Sultan Ry. Co. v. *Department of Labor*, 277 U. S. 135;

Bryant v. *Zimmerman*, 278 U. S. 63, 67;

Puget Sound Power & Light Co. v. *City of Seattle*, 291 U. S. 619;

Pacific Telephone & Telegraph Co. v. *City of Seattle*, 291 U. S. 300;

Weston v. *City Council of Charleston*, 27 U. S. 449, 2 Pet. 449.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code.

Respectfully submitted,

F. G. Dorety,
Thomas Balmer,
Edwin C. Matthias,
Attorneys for Appellant.

(7633-C)